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Supreme Court of the United States

OCTOBER TERM, 1997

RACHEL BAUCHMAN,

Petitioner,

—v.—

WEST HIGH SCHOOL, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO HER PETITION FOR WRIT OF CERTIORARI

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13pp

Table of Contents

Page

I. Respondents Mischaracterize the Amended Complaint and the Decision Below 2

II. *Crawford-El* Governs the Issue of the Standard of Proof of Intent in Constitutional Torts and Calls for Reversal 4

III. The Decision Below Creates a Split With the Third, Fifth, Eighth and Eleventh Circuits, Which Accept Indirect Evidence to Prove Religious Purpose 5

IV. There Are No Alternative Holdings Below that Preclude a Grant of Certiorari 6

Conclusion 9

Table of Authorities

Page(s)

Cases

American Civil Liberties Union v. *Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir. 1996) 6

Bauchman v. *West High School*, 132 F.3d 542 (10th Cir. 1995) 3, 5, 7

Crawford-El v. *Britton*, ___ U.S. ___, 118 S. Ct. 1584, 1595 (1998) 4, 5

Crawford-El v. *Britton*, 93 F.3d 813 (D.C. Cir. 1996), *vacated and remanded*, 118 S. Ct. 1584 (1998) 4

Edwards v. *Aguillard*, 482 U.S. 578 (1987) 8

Genesee Brewing Co. v. *Stroh Brewing Co.*, 124 F.3d 137 (2d Cir. 1997) 4

Ingebretsen v. *Jackson Public School District*, 88 F.3d 274 (5th Cir. 1996) 6

Jager v. *Douglas County School District*, 862 F.2d 824 (11th Cir. 1989) 6

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 8

Linder v. *Department of Defense*, 133 F.3d 17 (D.C. Cir. 1998) 4

Page(s)

Lynch v. *Donnelly*,
465 U.S. 668 (1984) 7, 8

Stone v. *Graham*,
449 U.S. 39 (1980) 7

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Repeatedly in their briefs in opposition, respondents' arguments rest on a mischaracterization of the Amended Complaint as seeking to state a claim that religious singing, without more, is unconstitutional. Respondents also strain to characterize the decision below as far less sweeping than it in fact is. We address these misconceptions first, then turn to respondents' more substantive arguments.[1]

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[1] For purposes of brevity, this brief uses the abbreviations and defined terms established in the Petition.

I.

Respondents Mischaracterize the Amended Complaint and the Decision Below

The briefs in opposition put forward three central misconceptions:

First, this is not a case about whether all religious songs should be banned, Torg. Br. 1; Intervenors' Br. 11;[2] that argument is a strawman. Petitioner alleged — and, we submit, proved — specific statements and conduct by Torgerson during Rachel's year in the class evincing a purpose to promote religion that went beyond the selection of Christian tunes and use of Mormon and other Christian venues. As set forth in the Petition, in addition to scheduling predominantly Christian music, TCA 334-35, 342-43; *see also* TCA 409-11, 672-74, Torgerson instructed the class that a true appreciation of music comes through religious experience, TCA 770-71; offered a prayer to the "heavenly father" at a performance, TCA 331, 338; criticized Rachel for expressing concerns about his endorsement of religion, including expressly comparing Mormons like Torgerson with Jews like Rachel, A.C. ¶ 17(k); TCA 167-68, 772; and, after formally canceling the annual class tour, sought to organize a secret replacement tour limited to Christian students, A.C. ¶ 17(g)-(h); TCA 166-67; 329-31; 353-54; 785-86. In addition, during the limited discovery it emerged that the School District had reprimanded Torgerson — albeit secretly and ineffectually — for attempting to arrange for the class,

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[2] "Torg. Br." refers to Respondent Richard Torgerson's Brief in Opposition to the Petition, and "Intervenors' Br." refers to Respondent Intervenors' Brief in Opposition to the Petition.

during Rachel's year, to perform as part of religious ceremonies at a church. TCA 586; *see also* TCA 811.[3]

Respondents' answer to these allegations is, like the courts' below, simply to select evidence that they contend negates the allegations, ignore other evidence, and conclude that the allegations therefore are groundless. But that selecting and weighing of evidence is precisely what a court is not supposed to do at the pleading stage.

Second, the Tenth Circuit's opinion did not merely require specificity in pleading religious purpose, or something more than "conclusory allegations of an improper purpose," as Intervenors would have it. Intervenors' Br. 10. As indicated above, the Amended Complaint offered plenty of specificity. That did not satisfy the Tenth Circuit, because the standard it erected requires "conduct or statements that *expressly*," *Bauchman* v. *West High School,* 132 F.3d 542, 561 (10th Cir. 1997) (A40), and contemporaneously, *id.* at 560 (A39), manifest an intent to promote religion.

Third, the fact that the motion below was one to file an amended complaint rather than a motion to dismiss after the complaint was filed makes no difference. The courts below denied the motion because the filing would supposedly have been futile, in that they thought the Amended Complaint would not have survived a motion to dismiss. *See Bauchman*, 132 F.3d at 561-62 (A41-42). The fact that the denial of the motion

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[3] During Rachel's year in his class, Torgerson also admitted that he "bring[s] religion into the classroom, and . . . ask[s his] students to do the same." TCA 774. Intervenors claim to see a significant difference between that version of the statement, which appeared in an interrogatory response, and Mrs. Bauchman's recollection during deposition, "I don't believe in leaving my religion at home and ask my students not to do the same." Intervenors' Br. 6 n.5. It stretches the imagination to think that a jury would perceive a material distinction between these two versions of the statement.

is reviewable only for abuse of discretion, School Dist. Br. 6,[4] is irrelevant, because it is an abuse of discretion to apply the wrong legal standard, *Linder* v. *Department of Defense*, 133 F.3d 17, 24 (D.C. Cir. 1998); *Genesee Brewing Co.* v. *Stroh Brewing Co.*, 124 F.3d 137, 142 (2d Cir. 1997), which is what occurred here. In short, this case remains at the pleading stage, and the ruling below is correspondingly broad in its terms and effect.

II.

Crawford-El Governs the Issue of the Standard of Proof of Intent in Constitutional Torts and Calls for Reversal

Respondents argue that the fact that *Crawford-El* v. *Britton*, ___ U.S. ___, 118 S. Ct. 1584 (1998), addressed a restriction on proof of intent that was phrased in terms of a burden of proof — clear and convincing evidence — somehow makes that case inapplicable to the restriction on proof of intent here. Torg. Br. 16; School Dist. Br. 15. That reasoning is nonsensical. If anything, *Crawford-El* applies with greater force to this case, because the restriction is so much more sweeping. The District of Columbia Circuit had created a relatively narrow, albeit unconstitutional, increase in the plaintiff's burden at trial; whereas the Tenth Circuit would exclude certain claims altogether based on a broad proscription of whole categories of evidence. In fact, as noted in Rachel's Supplemental Brief at 3, the Tenth Circuit test barring circumstantial and historical evidence of intent is precisely the test that the D.C. Circuit had earlier adopted and then rejected as overbroad. 118 S. Ct. at 1589 n.5; *Crawford-El* v. *Britton*, 93 F.3d 813, 815, 817-18 (D.C. Cir. 1996), *vacated and remanded*, 118 S. Ct. 1584 (1998). Thus, to an even greater extent than in *Crawford-El*, the

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[4] "School Dist. Br." refers to the School District Respondents' *Brief in* Opposition to the Petition.

Tenth Circuit has "alter[ed] the cause of action itself in a way that undermines the very purpose of § 1983 — to provide a remedy for the violation of federal rights." *Crawford-El*, 118 S. Ct. at 1595.

Further, it is not true that the Tenth Circuit was motivated by different policy concerns from those that motivated the D.C. Circuit, as the School District respondents claim. *See* School Dist. Br. 14-15. Both courts relied on the perceived need to protect government officials from the intrusions of civil discovery. *See Bauchman*, 132 F.3d at 560-61 (A39-40); *Crawford-El*, 118 S. Ct. at 1590. This Court in *Crawford-El* rejected that policy concern as a basis for altering the quantum of evidence a plaintiff must amass to prove intent, relying instead on case management techniques to address that concern. *Id.* at 1596-98. That rule applies with full force to the Tenth Circuit's new standard of proof in this case.

III.

The Decision Below Creates a Split With the Third, Fifth, Eighth and Eleventh Circuits, Which Accept Indirect Evidence to Prove Religious Purpose

The Intervenors attempt to argue away the split in the Circuits based primarily on the misreading of the decision below to be merely a requirement of specificity rather than a requirement of express and contemporaneous communication of an intent to promote religion. Intervenors' Br. 9-11. Torgerson's version is based on a mischaracterization of the Amended Complaint as being about religious singing only, rather than a far broader complaint about the teaching practices of a long-tolerated rogue teacher. Torg. Br. 17-18. These points have been addressed above.

Beyond that, respondents' arguments strengthen the point that the Tenth Circuit has split from its sister Circuits on the use of indirect evidence to prove religious purpose. Respondents

argue that the Third, Fifth, Eighth and Eleventh Circuits' decisions relying on indirect evidence to prove intent are inapposite because each considered policy or legislation, rather than an individual's actions. School Dist. Br. 11; Torg. Br. 18. But the other Circuits' use of indirect evidence to prove legislative intent — which is truly controversial, *see* Petition 13-14 — makes all the more extreme the Tenth Circuit's refusal to consider such evidence in the context of an individual actor, where that use is routine.

Torgerson's argument that the other Circuits relied on "objectively discernible" evidence of intent, rather than the kind of evidence Rachel relies on, Torg. Br. 18, is essentially wordplay. The historical evidence relied on by the Third and Eleventh Circuits, or the evidence of public reaction relied on by the Fifth Circuit, is no more "objectively discernible" than the evidence of classroom speeches and school reprimands relied on by petitioner. *See ACLU* v. *Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1484 (3d Cir. 1996); *Jager* v. *Douglas County Sch. Dist.*, 862 F.2d 824, 829-830 (11th Cir. 1989); *Ingebretsen* v. *Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996).

IV.

There Are No Alternative Holdings Below that Preclude a Grant of Certiorari

Respondents contend that the district court's holdings on qualified immunity preclude review here. School Dist. Br. at 6; Torg. Br. 21-22; Intervenors' Br. 6-8. This contention was, however, never reached by the court below. The defense is in any event founded on respondents' erroneously narrow view of the Amended Complaint as being based on the singing of religious songs alone. Fairly viewed, the Amended Complaint pleads conduct that violated what any reasonable observer would know to be clearly established law. In fact, as evidenced

by the reprimands Torgerson received immediately before, and during, Rachel's school year, TCA 586, 811, it is evident that both Torgerson and the School District respondents knew his conduct to be contrary to the well-established command of the Establishment Clause.

The School District respondents (but not the others) contend that the Tenth Circuit would have barred the claim even absent its erroneous standard of proof of intent because the court found that the Amended Complaint pled only the existence of a religious purpose, not the absence of a secular purpose. School Dist. Br. 7. This error is properly before the Court and does not preclude certiorari, because it is encompassed within the second question presented: it is based on the lower courts' highly restrictive reading of the Amended Complaint to allege a claim based on choral singing of religious songs with nothing more. 132 F.3d at 553, 560 (A23, 38). Fairly read, the Amended Complaint alleges actions by Torgerson — such as planning a class tour that would exclude non-Christians or teaching that a true appreciation of the class repertoire could only be achieved by religious experience — that could only be motivated by a religious purpose.

Moreover, the Tenth Circuit's standard is wrong as a matter of law. This Court's decisions do not permit any purportedly secular reason, however incidental, to immunize fiercely religious purposes behind government conduct.[5] Rachel's substantiated allegations demonstrate that despite an "avowed" secular purpose, Torgerson's "pre-eminent purpose . . . [was] plainly religious in nature." *Stone*, 449 U.S. at 41. As Justice

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[5] If this were the case, then this Court, in *Stone* v. *Graham*, 449 U.S. 39, 41-42 (1980), would not have prevented Kentucky public schools from posting copies of the Ten Commandments in classrooms to instill the Commandments' secular values (*e.g.*, one should not kill) to students, as well as to illustrate their connection to the American legal system. *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

O'Connor recognized, the "purpose prong of the *Lemon* test . . . is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring).[6]

Finally, Torgerson's argument that this Court should reject an Establishment Clause claim based on religious purpose without effect or entanglement, Torgerson Br. 19, contradicts this Court's explicit holding that a religious purpose alone is sufficient to render government action unconstitutional. *Edwards* v. *Aguillard*, 482 U.S. 578, 585 (1987).[7]

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[6] Respondents themselves stumble in the attempt to resuscitate the Tenth Circuit's absolutist position. Respondents twice refer to the question of Torgerson's "primary motivation," School Dist. Br. 8, 9, thus conceding that the relevant issue is whether Torgerson was primarily motivated by his purpose of promoting religion. This question of motivation is a classic jury issue that is eminently susceptible to proof through indirect evidence.

[7] Rachel continues to assert her claims that respondents' conduct violated all three prongs of the Court's analysis in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

Conclusion

The Petition should be granted for plenary consideration, or granted and the decision below reversed and the case remanded for reconsideration in light of *Crawford-El*.

Respectfully submitted,

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